U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA ALLEN and DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, Menlo Park, Calif.

Docket No. 97-261; Submitted on the Record;
Issued December 15, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether the Office abused its discretion in approving an attorney's fee in the amount of $1,624.50.

On October 24, 1989 appellant, then a 32-year-old computer specialist, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her back on October 17, 1989 when she fell during an earthquake. The Office accepted the claim for low back strain on March 20, 1990. On May 9, 1990 the Office put appellant on the disability rolls for temporary total disability.

In a report dated March 29, 1991, Dr. Howard Sturtz, a second opinion physician and Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed medical records. He concluded that appellant had made a complete recovery from her employment injury and required no additional medical treatment.

In a report dated April 19, 1991, Dr. Gilbert J. Kucera, an attending Board-certified orthopedic surgeon, diagnosed acute moderate strain to the cervical, dorsal and lumbar spine as well as to both knees.

Due to the conflict in medical evidence between Drs. Kucera and Sturtz's opinions as to whether appellant continued to be disabled, the Office referred appellant to Dr. Roger D. Dainer, an impartial medical specialist and Board-certified orthopedic surgeon.[1] In a report dated September 13, 1991, Dr. Dainer considered appellant's history of injury, performed a physical examination, reviewed the medical records and concluded that appellant could perform her usual employment of computer specialist. He noted objective disability factors of lumbar paravertebral tenderness and straight leg raise test producing back pain at 80 degrees. Dr. Dainer

[1] *See* 5 U.S.C. § 8123.

diagnosed chronic lumbar strain, industrial injury and that she "has a disability involving her low back that would preclude very heavy lifting." Regarding appellant's job requirements, he noted "her job required her to bend, stoop and squat throughout the workday as well as to lift up to 50 [pounds]." Dr. Dainer opined that appellant should be able to perform her former position of computer specialist and would not recommend further physical therapy.

By decision dated July 27, 1992, the Office found that appellant had recovered from her October 17, 1989 employment injury based upon the opinion of Dr. Dainer, the referee physician.

Appellant requested an oral hearing. In a decision dated November 1, 1993, the hearing representative vacated the previous decision and remanded for clarification from Dr. Dainer. The hearing representative found that his opinion was not rationalized nor was it based on a complete and accurate history. The hearing representative also noted Dr. Danier did not have an accurate description of the physical requirements of appellant's position when he issued his opinion. The hearing representative found that the Office had not met its burden of proof in terminating appellant's benefits.

By letter dated February 22, 1994, the Office included a copy of appellant's position description and requested Dr. Dainer's opinion as to whether she could perform her usual employment. In a supplemental report dated March 1, 1994, he opined that appellant has a partial permanent disability which would preclude heavy work based on both subjective and objective factors. Dr. Dainer also stated that he believed appellant could "work at full capacity" as a computer specialist and need no retraining.

On April 14, 1994 the Office referred appellant to Dr. Norman L. Portello, to resolve the conflict in the medical evidence as Dr. Danier's supplementary report and conclusions were insufficient to resolve the conflict. In a letter dated May 24, 1994, Dr. Portello, based upon a review of the record, history of the injury, and physical examination, determined that appellant had no disability relating to her low back although she is disabled due to her reactive depression. He diagnosed an internal derangement of the right knee based upon x-ray interpretation and physical examination. In a subsequent letter dated May 27, 1994, Dr. Portello reiterated his opinion that appellant's back problem had resolved based upon the objective evidence and she could return to her prior position of computer installer/operator.

By letter dated December 7, 1994, the Office issued a proposed notice of termination which was finalized by a decision dated January 10, 1995.

Appellant, through her representative, requested a hearing which was held on July 20, 1995.

By decision dated September 29, 1995, the hearing representative affirmed the December 7, 1994 decision. The hearing representative noted that as appellant has been reemployed with no wage loss, the only issue was whether the Office properly terminated medical benefits. The hearing representative then determined that Dr. Portello, the impartial medical examiner, on remand, provided sufficient rationale to support his conclusion that appellant had no continuing effects related to her accepted employment injury.

By decision dated May 1, 1996, the Office approved attorney fees in the amount of $1,642.50. The Office noted that appellant had contested the reasonableness of the fee. The Office stated that it had examined the case record with regard to the usefulness of the representative's service, nature and complexity of the claim, actual time spent on development, amount of charges for similar services, professional qualifications of the representative and all other pertinent facts in the record. The Office found the fee of $1,642.50 reasonably commensurate with the actual necessary work performed in representation of appellant before the Office.

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate medical benefits without establishing that the disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.[3]

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4] The Board finds that Dr. Portello's opinion is sufficiently well rationalized in establishing that appellant's accepted low back problem due to her October 17, 1989 employment injury had resolved and is based on a proper factual background. Therefore, as an impartial medical specialist, Dr. Portello's opinion constitutes the weight of the evidence that appellant no longer required medical treatment for her accepted employment injury.

The Board further finds that the Office did not abuse its discretion by approving an attorney's fee in the amount of $1,642.50.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office. That is a function within the discretion of the Office based on the criteria set forth in section 10.145 of Title 20 of the Code of Federal Regulations.[5] The Board's sole function is to determine whether the action taken by the Office

---

[2] *Wallace B. Page*, 46 ECAB 227 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

[3] *Larry Warner*, 43 ECAB 1032 (1992); *see Patricia A. Kelley*, 45 ECAB 278 (1993); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[4] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane D. Roanhaus*, 42 ECAB 288 (1990).

[5] 20 C.F.R. § 10.145(b) provides the following criteria for approval of representative fees: "(b) the fee approved by the Office will be determined on the basis of the actual necessary work performed and will generally include but are not limited to the following factors: '(1) Usefulness of the representative's services to the claimant. (2) The nature and complexity of the claim. (3) The actual time spent on development and presentation of the claim. (4) The amount of compensation accrued and potential payments. (5) Customary local charges for similar services. (6) Professional qualifications of the representative.'"

on the matter of the attorney's fee constituted an abuse of discretion.[6] The Board has frequently stated that it will not interfere with or set aside a determination by the Office of a fee for representative services unless the evidence of record supports that the determination made by the Office represents an abuse of discretion. Pursuant to these guidelines, the evidence of record supports the action taken by the Office in approving a fee of $1,642.50 constituted an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated May 1, 1996 and September 25, 1995 are hereby affirmed.

Dated, Washington, D.C.
December 15, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[6] *William Lee Gargus*, 25 ECAB 187 (1974).